

§ 821.62

made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding. Ex parte communications solely relating to matters of Board procedure or practice are not prohibited by this section.

§ 821.62 Procedures for handling ex parte communications.

A Board decisional employee who receives, makes or knowingly causes to be made a communication prohibited by § 821.61 shall place in the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and
- (c) All written responses, and memoranda stating the substance of all oral responses, to the communications described in paragraphs (a) and (b) of this section.

§ 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication made or knowingly caused to be made by a party in violation of § 821.61, the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) or the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interest of justice and the policy of the underlying statutes it administers, consider a violation of § 821.61 sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused such a violation to occur. Alternatively, the Board may impose a sanction on the party's attorney or representative, including suspending or barring the attorney or representative from practicing before it, where such action would be appropriate and penalizing the party represented would not be in the interest of justice.

49 CFR Ch. VIII (10–1–04 Edition)

Subpart K—Judicial Review of Board Orders

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (*i.e.*, service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order (*see* § 821.50(b)). If a stay action is to be timely, any request must be filed sufficiently in advance of the effective date of the Board's order to allow for a reply and Board review.

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.

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AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S.

National Transportation Safety Board

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Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

(a) R.S. 4450, as amended (46 U.S.C. 239);

(b) Act of July 15, 1954 (46 U.S.C. 239a-b); or

(c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in § 825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

(b) Notice of appeal shall be addressed to the Docket Clerk, National Transportation Safety Board, Washington, DC 20594. At the same time, a copy shall be served on the Commandant (GL), U.S. Coast Guard, Washington, DC 20590.

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal.

§ 825.10 Referral of record.

Upon receipt of a notice of appeal, the Commandant shall immediately transmit to the Board the complete record of the hearing upon which his decision was based. This includes the charges, the transcript of testimony, and hearing proceedings (including exhibits), briefs filed by the party, the decision of the administrative law judge, and the Commandant's decision on appeal. It does not include intra-agency staff memoranda provided as advice to the Commandant to aid in his decision.

§ 825.15 Issues on appeal.

The only issues that may be considered on appeal are:

(a) A finding of a material fact is erroneous;

(b) A necessary legal conclusion is without governing precedent or is a de-

parture from or contrary to law or precedent;

(c) A substantial and important question of law, policy, or discretion is involved; or

(d) A prejudicial procedural error has occurred.

§ 825.20 Briefs in support of appeal.

(a) Within 20 days after the filing of a notice of appeal, the appellant must file, in the same manner as prescribed for the notice in § 825.5, a brief in support of the appeal.

(b) This document shall set forth:

(1) The name and address of the appellant;

(2) The number and a description of the license, certificate, document, or register involved;

(3) A summary of the charges affirmed by the Commandant as proved;

(4) Fact findings by the Commandant disputed by the appellant;

(5) Specific statements of errors of laws asserted;

(6) Specific statements of any abuse of discretion asserted; and

(7) The relief requested.

(c) Objection based upon evidence of record need not be considered unless the appeal contains specific record citation to the pertinent evidence.

(d) When a brief has been filed by appellant under this section, the Coast Guard may, within 15 days of service of the brief on the Commandant, submit to the Board a reply brief.

(e) If a party who has filed a notice of appeal does not perfect the appeal by the timely filing of an appeal brief, the Board may dismiss the appeal on its own initiative or on motion of the Coast Guard.

§ 825.25 Oral argument.

(a) If any party desires to argue a case orally before the Board, he should request leave to make such argument in his brief filed pursuant to § 825.20.

(b) Oral argument before the Board will normally not be granted unless the Board finds good cause for such argument. If granted, the parties will be advised of the date.

§ 825.30

49 CFR Ch. VIII (10–1–04 Edition)

§ 825.30 Action by the Board.

(a) On review by the Board, if no reversible error is found in the Commandant's decision on appeal, that decision will be affirmed.

(b) On review by the Board, if reversible error is found in the Commandant's decision on appeal, the Board may:

(1) Set aside the entire decision and dismiss the charges if it finds the error incurable; or

(2) Set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration if it finds the error curable.

(c) When a matter has been remanded to the Commandant under paragraph (b) of this section, the Commandant may act in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the administrative law judge of the Coast Guard who heard the case, or to another administrative law judge of the Coast Guard, with appropriate directions.

§ 825.35 Action after remand.

When a case has been remanded under § 825.30, a party shall retain all rights of review under 46 CFR part 5 and this part, as applicable.

§ 825.40 Ex parte communications.

(a) As used in this section:

Board decisional employee means a Board Member or employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

(b) The prohibition of paragraph (c) of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibition shall apply at the time of the acquisition of such knowledge.

(c) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of Board procedure or practice are not prohibited by this paragraph.

(d) A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by paragraph (c) of this section, shall place on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communication; and

(3) All written responses, and memoranda stating the substance of all oral responses, to materials described in paragraphs (d) (1) and (2) of this section.

(e) Upon receipt of a communication knowingly made or caused to be made in violation of paragraph (c) of this section, the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(f) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Board, consider a violation of this section sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

(Authority: Sec. 4, Government in the Sunshine Act, Pub. L. 94-409, amending 5 U.S.C. 556 (d) and 5 U.S.C. 557; Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*))

[42 FR 21614, Apr. 28, 1977]